

# TRANSCRIBED FROM DIGITAL RECORDING

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

4 S. JAIN, et al., )  
5 Plaintiffs, )  
6 vs. ) No. 17 C 0002  
7 BUTLER ILLINOIS SCHOOL DISTRICT 53, )  
8 et al, ) Chicago, Illinois  
Defendants. ) August 22, 2017  
 ) 1:34 P.M.

10 TRANSCRIPT OF PROCEEDINGS - Hearing  
BEFORE THE HONORABLE SIDNEY I. SCHENKIER, Magistrate Judge

## 11 APPEARANCES:

12 For the Plaintiffs: MR. RICHARD P. CARO  
13 724 N. Northwest Highway, Apartment A  
Park Ridge, Illinois 60068  
(Appearing telephonically)

18 For School District  
Defendants: ANCEL, GLINK, DIAMOND, BUSH,  
DICIANNI & KRAFTHEFER, P.C.  
19 140 South Dearborn Street  
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20 BY: MS. LUCY B. BEDNAREK

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22 Official Court Reporter  
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25 NOTE: Please notify of correct speaker identification.  
FAILURE TO SPEAK DIRECTLY INTO THE MICROPHONE MAKES PORTIONS  
UNINTELLIGIBLE.

1 **APPEARANCES: Continued**

2 For Defendants Massey  
3 and Roselli:

4 HINSHAW & CULBERTSON LLP  
5 222 North LaSalle Street  
6 Suite 300  
7 Chicago, Illinois 60601  
8 BY: MS. KATHERINE GEORGIA SCHNAKE

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1 (Proceedings held in open court:)

2 THE CLERK: 17 C 0002, Jain, et al. versus Butler  
3 Illinois School District 53, et al., for hearing on ruling on  
4 withheld documents.

5 THE COURT: Good afternoon. We have someone  
6 participating by phone.

7 | Please identify yourself.

8 MR. CARO: Richard Caro, attorney for plaintiffs.

9 THE COURT: And in the courtroom for the plaintiff?

10 MR. HARBECKE: Fred Harbecke, local counsel for  
11 plaintiff.

12 MS. BEDNAREK: Lucy Bednarek on behalf of the school  
13 district defendants.

14 MS. SCHNAKE: Kate Schnake on behalf of defendants  
15 Roselli and Massey.

16 THE COURT: All right. Well, we have the motion  
17 concerning the documents withheld on the privilege log, some of  
18 which are subject to a challenge. We also have a more recently  
19 filed motion to compel disclosure by the plaintiff.

20 Has the defense seen the motion?

21 MS. BEDNAREK: The motion to compel, your Honor,  
22 to the -- not in -- we didn't file a response, but we complied  
23 with plaintiffs's requests.

24 THE COURT: Do you agree that the issues you raised in  
25 your motion have now been addressed, Mr. Caro?

1                   MR. CARO: No, your Honor. The defendants in amending  
2 (unintelligible) were supposed to amend their interrogatory  
3 answers. They were not amended, just a letter was sent with  
4 the -- identifying the new documents. That puts the burden on  
5 me to cut and paste the -- you know, the PDF and the new  
6 answers in it, and -- and it is more (unintelligible) that I  
7 shouldn't have to do.

8                   THE COURT: Well, Mr. Caro, you said that in your  
9 motion already. I don't need to hear it again.

10                  MR. CARO: Yes. Oh, okay.

11                  Then --

12                  THE COURT: So the issue --

13                  MR. CARO: -- with respect --

14                  THE COURT: -- the issue --

15                  MR. CARO: With respect to the resignation documents  
16 dealing with Voliva, the only thing they produced was the  
17 formal resignation agreement. There is nothing explaining the  
18 reasons why she was -- resigned, which is what we sought  
19 because we -- you know, it could make -- her credibility may go  
20 or what actions she did in connection with my clients that may  
21 have been wrongful.

22                  And, finally, with respect to the teacher, a person  
23 who covered the 2:00 P.M. class, all they said is, plaintiff  
24 child identified the woman by her last name. But the  
25 identification -- and the school district did not confirm that,

1 and they provided no identifying information, her name,  
2 address, contact information.

3 MS. BEDNAREK: I can address all three of those.

4 With regard to the substitute teacher information that  
5 plaintiff has requested, on July 28th we sent a letter  
6 confirming that the school district and no other school  
7 district defendant knows the identity of any substitute for  
8 Ms. Owen's class on January 19th, 2016.

9 THE COURT: May I see the letter?

10 MS. BEDNAREK: Yes, your Honor.

11 The second page after the email.

12 (Brief interruption.)

13 THE COURT: All right. I'm looking at the letter of  
14 July 28, 2017, which in the last sentence says, please also be  
15 advised that neither the school district nor Lisa Owen knows  
16 the identity of any substitute for Ms. Owen's class on January  
17 19th, 2016.

18 MR. CARO: Okay. I didn't see that letter, your  
19 Honor, so --

20 THE COURT: The July 28, 2017, letter.

21 MS. BEDNAREK: Your Honor, we --

22 MR. CARO: Let me double check to make sure I received  
23 it.

24 MS. BEDNAREK: Your Honor, we sent it to -- emailed it  
25 to him again yesterday, which is the first document on

1 the -- what you're looking at.

2 It was originally emailed July 28th.

3 THE COURT: All right. So can we take that off the  
4 list, Mr. Caro?

5 MR. CARO: Yes.

6 THE COURT: Okay. Next?

7 MS. BEDNAREK: With regard to the resignation  
8 document, all we have is what we have produced, and those are  
9 also attached to the July 28th letter.

10 Mr. Caro may think that there is something else out  
11 there, but there is not. So we produced responsive documents,  
12 which is the resignation agreement, also a letter from  
13 Ms. Voliva.

14 THE COURT: Okay. So you say there is no other  
15 internal materials, though, no emails, no other written  
16 communications concerning that subject?

17 MS. BEDNAREK: That's correct. I believe so.

18 But regarding the reasons, she voluntarily resigned.

19 THE COURT: Well, I'm not asking for your  
20 interpretation of what happened. I'm asking for any documents  
21 that may reflect what happened, which may be that she  
22 voluntarily resigned, which Mr. Caro suspects may be something  
23 else. I have no idea.

24 My only question is whether what you're saying is that  
25 a -- within the records of the school district the only two

1 documents that pertain to Ms. Voliva's resignation or the  
2 reasons for them are the actual resignation agreement, a  
3 separate agreement, and her letter of August 8th, 2016.

4 MS. BEDNAREK: That's my understanding, yes.

5 THE COURT: And there is nothing in the personnel file  
6 that discusses anything about reasons for her resignation?

7 MS. BEDNAREK: I don't believe so, no.

8 THE COURT: You don't believe so or you don't know so?

9 MS. BEDNAREK: Regarding the reasons for her  
10 resignation, no, there is nothing in her personnel file.

11 THE COURT: Anything else regarding her resignation?

12 MS. BEDNAREK: I don't believe so.

13 THE COURT: You don't believe so or you don't know so?

14 MS. BEDNAREK: I --

15 THE COURT: It is late in the game.

16 MS. BEDNAREK: I understand that, your Honor.

17 THE COURT: It is late in the game for us to be saying  
18 I think.

19 MS. BEDNAREK: There are no other responsive documents  
20 relating to her resignation.

21 THE COURT: All right. You have that on the record,  
22 Mr. Caro.

23 MR. CARO: Yes, your Honor.

24 THE COURT: And then the amendment of the  
25 interrogatory responses.

1 MS. BEDNAREK: Yes, your Honor. We were instructed  
2 (unintelligible) your Honor ordered us to supplement by  
3 identifying Bates stamp number, which we did.

4 And you would like us to produce something in addition  
5 to that. We can, but it was my understanding all that we  
6 needed to do to supplement was identify the interrogatory  
7 number and the responsive document by Bates stamp number, which  
8 we did.

9 THE COURT: The order says defendants shall amend  
10 their interrogatory responses.

11 MS. BEDNAREK: That's in --

12 THE COURT: If you amend a document, how do you amend  
13 it? If you amended your answer, would you just send a letter  
14 that says, I'm amending paragraph 5 of my answer or would you  
15 serve an amended answer that has in it in that one document the  
16 amendment?

17 MS. BEDNAREK: It was my understanding that that was  
18 for -- was all that was required because all he wanted was the  
19 identifying Bates stamped number of the responsive documents,  
20 which we provided. If your Honor would like us to --

21 THE COURT: You know --

22 MS. BEDNAREK: -- resubmit --

23 THE COURT: -- counsel -- you know, Ms. Bednarek, this  
24 isn't what he wants, this is what I ordered. Are you telling  
25 me that you think that amending a pleading means, I send you a

1 letter? Is that how you interpret amend a pleading?

2 MS. BEDNAREK: Well, your Honor --

3 THE COURT: Is that how you interpret amend the  
4 pleading?

5 MS. BEDNAREK: The pleading, no.

6 THE COURT: Okay. So -- and when you serve an  
7 interrogatory response, one of the key things about it is it is  
8 on oath.

9 MS. BEDNAREK: That's correct.

10 THE COURT: Is a letter on oath?

11 MS. BEDNAREK: The Bates stamped --

12 THE COURT: Is a letter on oath?

13 MS. BEDNAREK: No, your Honor.

14 THE COURT: Okay. Amend the interrogatory responses  
15 so that the actual interrogatory answers has what's in the  
16 letter. I don't quarrel that you supplied the information.  
17 But for all of you to be fussing about something that is so  
18 obvious, after so long in this case, is rather disheartening.

19 So the motion to compel is denied as moot as to the  
20 Voliva -- the Voliva resignation documents and as to the  
21 requirement to identify who was the substitute for Ms. Owen.

22 The motion is granted as to the requirement that the  
23 actual written interrogatory responses, the -- on their face  
24 amended to add the Bates numbers, which have been supplied in  
25 another means, but to do that so it is on oath.

1 MS. BEDNAREK: Okay. Your Honor, understood.

2 THE COURT: All right.

3 MS. BEDNAREK: Can I have -- can I have my -- the  
4 documents that I provided to you?

5 THE COURT: Oh, of course you can.

6 MS. BEDNAREK: Thank you.

7 THE COURT: Now I have got to find out where I put it.  
8 I have got a lot of paper up here.

9 Here you go.

10 Can you do that by Friday?

11 MS. BEDNAREK: It's the -- I believe it is the first  
12 week back at school. I may not be able to get all of  
13 the -- the signatures needed by Friday. So if I could have  
14 until the end of next -- seven days, that would be better, your  
15 Honor.

16 THE COURT: Is that all right with you, Mr. Caro?

17 MR. CARO: That's fine, your Honor.

18 THE COURT: Okay. So that would be the 29th.

19 All right. Now on to the privilege review issue. We  
20 have got actually, I guess, four groups of documents, one, two,  
21 three, and then the FOIA documents.

22 I have reviewed, all of the memoranda that you  
23 submitted in connection -- excuse me -- with the issue. I have  
24 reviewed the documents that were identified as the sample to be  
25 reviewed.

1           Let me start with Group 1. And I want to talk for a  
2 moment about -- kind of the debate about whether Ms. Massey  
3 could be the investigator and the lawyer for the board. And I  
4 am addressing that issue not from the question or from the  
5 vantage point of whether, if so, that creates some conflict of  
6 interest. I express no opinion about that. That's an issue  
7 that, to the extent people wish to pursue that, that will be  
8 before Judge Guzman.

9           What I am addressing is really kind of an antecedent  
10 question as to whether the role of investigator somehow means  
11 that Ms. Massey could not have an attorney-client relationship  
12 with the board. That means incapable of forming one. But  
13 that's kind of the argument that, it seems to me, Mr. Caro  
14 makes.

15           A lead case that everybody debates on this point is  
16 the Sandra T.E. case, 600 F.3d. 612, a Seventh Circuit decision  
17 from 2009. In that case the district engaged a law firm to  
18 conduct an internal investigation into allegations of abuse.  
19 And the trial court had said that because the mission was  
20 investigative and not the provision of legal advice, the notes  
21 by the attorneys were not privileged and had to be produced.

22           The Seventh Circuit reversed finding that while  
23 investigative work was done, the notes, nonetheless, would be  
24 privileged if they related to their rendition of legal  
25 services. And in that case the Court explained that the

1 investigation into the underlying facts of alleged abuse was,  
2 and I quote, an integral part of the package of legal services  
3 for which the firm was hired and a necessary prerequisite for  
4 the provision of legal advice. That's at 620.

5 Now the plaintiffs argue that this case -- and this is  
6 in the reply memorandum -- is inapplicable here because, unlike  
7 the case here, the attorneys who were selected. And Sandra  
8 T.E. had no prior relationship with the Berwyn School District.

9 By contrast, the plaintiffs say the defendants had an  
10 ongoing relationship with the law firm that employed  
11 Ms. Massey, and that she really was not an investigator but was  
12 used to, and, I quote, whitewash and ignore the wrongdoing that  
13 plaintiffs had complained about. That's quoting from the reply  
14 at 4.

15 Put another way, the -- as I read that, plaintiffs say  
16 that Sandra T.E. does not apply because in plaintiffs's view  
17 there was a conflict of interest because -- with Massey serving  
18 in her role.

19 But as I have suggested to you already, I think that  
20 that argument puts the cart before the horse. Plaintiffs  
21 argue, in a portion of this that I will address later, that  
22 there is a conflict here that's sufficient to invoke the crime  
23 fraud exception to the privilege. But there is no occasion to  
24 consider the exceptions of the privilege unless there is first  
25 a privilege.

1           Now the plaintiffs's argument provides no basis for me  
2 to conclude that Massey was not investigating as part of the  
3 legal services she was providing, in particular the  
4 recommendations to the board as part of the EGP (phonetic)  
5 process.

6           So I do not pass at all as to whether the role of  
7 investigator and the role of lawyer with respect to that  
8 process created some conflict of interest or whether her  
9 affiliation with the same firm as Ms. Roselli, who was counsel  
10 for the board, creates any conflict of interest. But what I do  
11 reject is the argument that Ms. Massey's communications could  
12 not be subject to the attorney-client privilege.

13           So with that backdrop, let me go through the documents  
14 that are called out in Group 1.

15           The first one is -- and I'm going to illuminate the  
16 letter prefixes since they are all the same.

17           7204 these -- this is a series or, I should say, a set  
18 of notes. The log does not say who prepared the notes or to  
19 whom the notes were sent or the date that they were created.

20           Is it the defense view that you have no idea about any  
21 of that?

22           MS. BEDNAREK: I'm sorry, which document are you  
23 referring to, the --

24           THE COURT: RS 007204.

25           MS. BEDNAREK: If I -- if it is the document I'm

1 thinking of, it would have been Lisa Owen's notes. And I  
2 thought I had had that in there.

3 Oh, that? That I had -- I do not know. That's not  
4 the document I was thinking of.

5 THE COURT: Well, it talks about -- and I'm not giving  
6 away anything here -- my investigation. It talks about an  
7 attachment that is a document from Jain's attorney. It talks  
8 about something that occurred on April 5th.

9 So from that, isn't it pretty clear that it is after  
10 April 5th? Isn't it pretty clear that it was somebody who was  
11 investigating? Is this Ms. Massey?

12 MS. BEDNAREK: It would be Ms. Massey if it was after  
13 April 5th.

14 THE COURT: Yeah. Then why isn't this -- why didn't  
15 you say that on the log?

16 The document that's referenced -- and do you have this  
17 in front of you?

18 MS. BEDNAREK: I printed this out. And as I got  
19 halfway to here, I realized I left it on my printer. So I  
20 don't have it in front of me.

21 MS. SCHNAKE: Your Honor, I didn't bring it either. I  
22 didn't realize that we were going to go through them one  
23 by one.

24 THE COURT: Okay.

25 MS. BEDNAREK: I reviewed these documents a lot

1 though, so I --

2 THE COURT: Well, you know which one --

3 MS. BEDNAREK: -- should be able to pick up --

4 THE COURT: -- I'm talking about now. And it refers  
5 to a document from Mr. (unintelligible).

6 MS. BEDNAREK: He was the attorney for --

7 THE COURT: The Jains.

8 MS. BEDNAREK: -- plaintiff.

9 THE COURT: Well, you know which one I'm talking about  
10 now.

11 MS. BEDNAREK: Yes.

12 THE COURT: Right. So that attachment that's referred  
13 to, has that been produced?

14 MS. BEDNAREK: Yes.

15 THE COURT: Okay. The rest of the document is work  
16 product. It creates -- it includes Ms. Massey's mental  
17 impressions. To the extent it is not mental impressions, it is  
18 simply stating what's in that response, which has already been  
19 produced. So I will sustain the assertion of work product.

20 The next one is 21456. This is an email from  
21 Ms. Wennstrom to Ms. Roselli with a copy to Ms. Voliva dated  
22 January 23rd, 2016, and it references an underlying document.

23 You are familiar with this exhibit?

24 MS. BEDNAREK: It references an underlying document.

25 THE COURT: I can tell you what -- do you mind if I

1 say what it references?

2 MS. BEDNAREK: No.

3 THE COURT: Dr. Jain's interview questions and  
4 statements that were prepared.

5 MS. BEDNAREK: Okay.

6 THE COURT: Okay? Have those particular statements  
7 and questions been produced?

8 MS. BEDNAREK: No. The draft questions to ask  
9 Dr. Jain during her interview would have been marked work  
10 product.

11 THE COURT: Okay. And those were prepared after the  
12 interview of Plaintiff A?

13 MS. BEDNAREK: Right, the original January 19th  
14 interview.

15 THE COURT: Right.

16 MS. BEDNAREK: Yes.

17 THE COURT: Okay. This particular document is  
18 withheld on the basis of attorney-client privilege. I sustain  
19 that because it is an email from Wennstrom to Ms. Roselli  
20 seeking legal advice.

21 The next document is 21457. This is an email chain.  
22 Most of the emails in the chain are between various people  
23 from -- on the board, defendants to Plaintiff A's parents or  
24 one of them or both of them.

25 The lead email is one from Ms. Wennstrom to

1 Ms. Roselli dated January 23rd, 2016.

2 So the email chain which has the emails between  
3 members of the board -- the board, the district defendants, I  
4 should say, and Plaintiff A's, parents one or both of them.  
5 Have those all been produced?

6 MS. BEDNAREK: Yes.

7 THE COURT: All right.

8 MS. BEDNAREK: Any correspondence with the Jain --

9 THE COURT: All right. Well, this is a particular  
10 communication with counsel regarding that. So I will sustain  
11 the assertion of attorney-client privilege.

12 The next is an email from Ms. Wennstrom to  
13 Ms. Roselli. It is 21571. That forwards certain notes dated  
14 January 19th, 2016.

15 So that particular document -- or I should say the  
16 notes that are reflected -- they have been produced, right?

17 MS. BEDNAREK: Yes, they have.

18 THE COURT: In fact they're Exhibit 2 to the  
19 complaint.

20 MS. BEDNAREK: Yes.

21 THE COURT: Okay. The top portion, the email from  
22 Ms. Wennstrom to Ms. Roselli concerns those notes, and so --  
23 the purpose of legal advice. So I will sustain the assertion  
24 of attorney-client privilege.

25 The next document is 21574. This is an email -- it is

1 an email chain. I'm sorry.

2 The first one is from Ms. Roselli to Margaret Fisher,  
3 who is a legal assistant at Robbin Schwartz. It forwards an  
4 email from Ms. Wennstrom to Ms. Roselli, dated January 19th,  
5 2016, which attaches a document and then discusses the  
6 document.

7 Are you familiar with this email?

8 MS. BEDNAREK: Yes, your Honor.

9 THE COURT: Do you know what the attachments we're  
10 talking about?

11 MS. BEDNAREK: I believe it was the same document  
12 referenced before, the Lisa Owen's notes.

13 THE COURT: Yes. It references the Geo Bee documents.

14 MS. BEDNAREK: Okay.

15 THE COURT: Two words. Geo Bee.

16 Okay. And then it has discussion or relating -- let  
17 me say, this providing information from Ms. Wennstrom to  
18 Ms. Roselli for the purpose of seeking legal advice. So the  
19 emails themselves I have no doubt are privileged.

20 My question is whether the attached documents have  
21 been produced.

22 MS. BEDNAREK: I'm sorry. I believe in response to  
23 the FOIA, which we also produced in this case, there were -- I  
24 don't know how many documents, maybe 15 documents, that were  
25 Geo Bee documents. And I would need to confirm it, but my best

1 guess is that's what they're referring to.

2 THE COURT: Well, here's what I am going to say, you  
3 know, this references Geo Bee documents. Certainly the  
4 communications that Ms. Wennstrom had with Ms. Roselli about  
5 the documents, about their significance, asking advice about  
6 it, that's privileged.

7 The underlying documents are not privileged. And  
8 attaching them to an email to counsel does not make them  
9 privileged. Okay? We can agree on that.

10 MS. BEDNAREK: Yes.

11 THE COURT: So you need to go back and confirm whether  
12 the attachments that are identified as Geo Bee documents have  
13 been produced. If they have already been produced, and there  
14 is not a need to produce them again. But if they haven't been  
15 produced, in their entirety, whatever was attached, then they  
16 need to be produced.

17 So I sustain the privilege as to the emails, but not  
18 as to any attachment that was itself a freestanding document.  
19 Are we clear on that?

20 MS. BEDNAREK: Yes.

21 THE COURT: Okay. The next document is 33900. These  
22 are communications between Ms. Wennstrom and Ms. Roselli, all  
23 on January 24th, 2016, which certainly the communication of  
24 factual information concerning the request for legal advice, I  
25 will sustain the assertion of attorney-client privilege.

1                   The next document is 34963. This is a long email  
2 chain for which there is an assertion of work product. The  
3 email -- I should say the last email in that chain is April  
4 10th, 2016, from Ms. Massey to Ms. Roselli. There are then  
5 emails that precede that between Ms. Roselli and Ms. Massey. I  
6 agree that those were work product.

7                   The last email in the chain is actually a duplicate of  
8 the email that is 21571, which has already been produced, you  
9 have told me. At least I think you have told me.

10                  MS. BEDNAREK: 21571.

11                  THE COURT: Yeah, that's the one that's Exhibit 2 to  
12 the complaint.

13                  MS. BEDNAREK: Okay. This was it.

14                  THE COURT: Right.

15                  MS. BEDNAREK: Notes.

16                  THE COURT: So -- yeah. So that's already been  
17 produced. So I'll sustain the assertion of work product here.  
18 They don't need to be produced again.

19                  The next document is 35659. Actually we'll take  
20 together the next one, 35659. The '58 one is an email from  
21 Zurich Udeh, who is an attorney at Robbin Schwartz, to  
22 Ms. Massey. The subject being investigation notes. And the  
23 next document '69 -- I'm sorry -- '59 is a set of notes.

24                  These are asserted to be work product. I agree with  
25 the work product assertion, so I will sustain that as to both.

1                   37236 is an email chain. The last -- or the last one  
2 in the chain is an email from Ms. Wennstrom to Ms. Massey dated  
3 April 4th, 2016. There are preceding emails that are between  
4 them. The assertion here is attorney-client privilege. I  
5 agree that it is privileged, so I will sustain that assertion.

6                   That covers everything in Group 1. So if my notes are  
7 correct, I have sustained the privilege except insofar as it  
8 pertains to the notes that were forwarded with 21571, which has  
9 already been produced. It is an exhibit to the complaint so  
10 there is no need to produce it again. And that also showed up  
11 in a later document that I discussed.

12                  And with respect to the Geo Bee documents that are  
13 attached to 21574, so to the extent those Geo Bee documents  
14 have not been produced, they should be produced.

15                  Now moving to Group 2, these are FOIA documents. The  
16 first one is 19917. Let me ask a question before I go through  
17 each one. These are all in some form listing of witnesses, of  
18 potential witnesses. Right?

19                  MS. BEDNAREK: Okay. Yes.

20                  THE COURT: You know what I am talking about.

21                  MS. BEDNAREK: Yes, I do.

22                  THE COURT: In the hearing was there a witness list?

23                  MS. BEDNAREK: I'm not actually sure there was an  
24 actual hearing.

25                  THE COURT: Okay. So in the report there is a

1 summary, as I recall, of people who are interviewed.

2 MS. BEDNAREK: Right.

3 THE COURT: There is nothing that says, I thought  
4 about interviewing this person but I didn't.

5 MS. BEDNAREK: No.

6 THE COURT: Okay. And there is no process there, as  
7 there is, for instance, in the lawsuit, in a lawsuit in federal  
8 court, that is part of 26(a)(1) disclosures you identify people  
9 who may have (unintelligible).

10 MS. BEDNAREK: Correct. There is no process.

11 THE COURT: That you may use. And in this case was  
12 there an interrogatory that asked for an identification from  
13 the plaintiffs's side -- let me ask Mr. Caro.

14 Did you serve any interrogatories that asked them to  
15 identify people who the defense believed may have knowledge  
16 relevant to any of the claims?

17 MR. CARO: I believe so, your Honor.

18 THE COURT: And do you know so or are you just  
19 believing so because you think it may be helpful?

20 MR. CARO: I'd have to look at the interrogatories to  
21 give a (unintelligible) a firm answer.

22 THE COURT: What I am asking is whether any of the  
23 information here about witnesses or potential witnesses who can  
24 disclose whether it is in the UGB process or in the lawsuit.

25 MS. BEDNAREK: No, and there wasn't an interrogatory

1 to that effect because I would have just listed the names --

2 THE COURT: Uh-huh.

3 MS. BEDNAREK: -- had they been in there.

4 MS. SCHNAKE: And other than the Rule 26 disclosures.

5 THE COURT: Right.

6 MS. BEDNAREK: Right. Actually I may have listed  
7 those in the Rule 26 disclosures now that I say that.

8 THE COURT: All --

9 MS. BEDNAREK: I need to pull that.

10 THE COURT: All of these people, all of these people  
11 or some of them?

12 MS. BEDNAREK: I need to look at it.

13 THE COURT: Okay. Well, I certainly never had a  
14 motion to compel, have I, Mr. Caro, that says, I asked them to  
15 identify people with knowledge, and they didn't give it to me.

16 Mr. Caro?

17 MR. CARO: Yes, your Honor. I believe the  
18 interrogatory asked for specific information, all documents  
19 pertaining to X, Y, and Z, and I -- the discrete subject  
20 matter.

21 What I don't know, without going through the  
22 interrogatories, is whether they asked for the identification  
23 of persons with knowledge of those facts. I'd have to double  
24 check.

25 THE COURT: Uh-huh. Okay. Well, let me say this.

1 The first email came 19917. You know, it lists potential  
2 witnesses but then has the commentary and exchange between  
3 attorneys concerning them. That is properly protected as work  
4 product.

5 19954 has a commentary, but also simply has a list of  
6 names. And those are discrete, and they are not identified or  
7 called out in any way, apart from the text.

8 And so my question is, you know, are these just a list  
9 of names (unintelligible) that work product as opposed to a  
10 discussion of why they may be important or not important?

11 MS. BEDNAREK: I think it would still be work product  
12 because it was a list that, I believe, Ms. Massey had drafted.  
13 So it would reflect her impressions on who she may or may not  
14 want to interview for the investigation.

15 THE COURT: Well, you would be able to lay it side by  
16 side to see who on the list wasn't interviewed, if anybody,  
17 right?

18 MS. BEDNAREK: Right.

19 THE COURT: But if you just gave a list of names, it  
20 doesn't tell you in this document what anybody thinks about the  
21 names if you redact the narrative, right?

22 MS. BEDNAREK: Right.

23 THE COURT: Okay.

24 MS. BEDNAREK: Right.

25 THE COURT: And so my question is, if he had served an

1 interrogatory that said, show me the list of people who may  
2 have knowledge, wouldn't -- wouldn't you have listed these  
3 people?

4 MS. BEDNAREK: I'm not sure if the reason she didn't  
5 interview them was because they didn't have knowledge.

6 THE COURT: Uh-huh.

7 MS. BEDNAREK: So I'm sure some of them would be  
8 excluded because if they did have knowledge, she would have  
9 interviewed them.

10 THE COURT: Uh-huh, uh-huh. Okay.

11 All right. Is there anything further?

12 Mr. Caro?

13 MR. CARO: No, your Honor.

14 THE COURT: All right. Well, here's -- let me  
15 go -- jump ahead. 36485 and 36488 are really of the same  
16 stripe as 19917 in the sense that it has list of names, but  
17 also woven in commentary that it becomes difficult to really  
18 tease out. And those to me are clearly work product.

19 You know, I'm having a little more difficulty with  
20 simply a list of names at potential interviewees. You  
21 interview them; you don't interview them.

22 I guess I'm inclined to require you to produce 19954  
23 insofar as it just has a list of the names, but you can redact  
24 the introductory commentary.

25 MS. SCHNAKE: Your Honor, I apologize. I have a

1 conference call at 2:30, which I can reschedule.

2 THE COURT: Okay.

3 MS. SCHNAKE: I just need to email my clients.

4 THE COURT: Okay.

5 MS. SCHNAKE: While -- I can do that while we're still  
6 proceeding if you don't mind.

7 THE COURT: Is that okay?

8 MS. BEDNAREK: That's fine.

9 THE COURT: All right. That takes care of category or  
10 Group 2.

11 Moving to Group 3, and on that one, as I really read  
12 the plaintiffs's argument, it is kind of -- you called out  
13 specific documents. But the real argument is that none of them  
14 should be protectable because any privilege is waived by the  
15 crime fraud or subject to the crime fraud exception.

16 Is that a fair understanding, Mr. Caro?

17 MR. CARO: Yes, your Honor.

18 THE COURT: All right. So let me give you my thoughts  
19 about the crime fraud analysis. In order to get through the  
20 attorney-client privilege, a party who invokes the crime fraud  
21 exception must provide *prima facie* evidence that -- and I'm  
22 quoting -- gives color to the charge by showing some foundation  
23 in fact.

24 And I quote US versus BDO Seidman, LLT, 492 F.3d, 806  
25 at 818, a Seventh Circuit decision from 2007.

1                   Only if that *prima facie* basis is established will a  
2 Court take the next step, which to require the respondent to  
3 provide an explanation to counter the *prima facie* evidence. A  
4 party who seeks to invoke the crime fraud exception need not  
5 make out a *prima facie* case that shows each and every element  
6 of a particular crime or fraud. But the name of the exception,  
7 I think, does give you some idea as to the parameters of its  
8 sweep.

9                   It would be too easy to invade the privilege if the  
10 exception could be invoked every time an adversary took an  
11 action that the party claiming the exception generally asserted  
12 was wrongdoing or a violation of his or her rights.

13                   In their request the plaintiffs cite to 15 asserted  
14 facts which they claim warrant application of the exception.  
15 Plaintiffs say, if I can kind of categorize and summarize then,  
16 that these asserted facts show that Ms. Massey and Mr. Roselli  
17 conspired with school officials to violate their rights by  
18 arranging the UGB (phonetic) process to be conducted in a way  
19 that was not fair, impartial, and independent, primarily by  
20 allowing Ms. Massey to be the investigator, which they say was  
21 a conflict of interest that was designed merely to rubber stamp  
22 the initial decision by Ms. Wennstrom by withholding  
23 information from the response to the FOIA request by asserting  
24 improperly the attorney-client privilege and by ignoring  
25 portions of the administrative record and instead limiting

1 consideration to what Ms. Massey and Roselli wanted to  
2 consider. In other words, by cherry picking.

3 Now these assertions may speak to whether the process  
4 was a fair process. But in my judgment the assertions do not  
5 rise to the level of a *prima facie* case that is sufficient to  
6 invoke the crime fraud exception.

7 It is at least to me clear that the principal  
8 assertions that the plaintiffs offer to invoke the exception  
9 are not matters that were withheld from them by the defendants.  
10 Plaintiffs know the information that they claim constitutes the  
11 conflict of interest.

12 Dr. Jain raised that during the UGB process. The fact  
13 that plaintiffs and the defendants disagree about whether  
14 Ms. Massey's involvement was a conflict of interest is not a  
15 basis to invade the privilege.

16 If the plaintiffs were correct about this view --  
17 well, I'm going to put it this way. If the plaintiffs are  
18 correct, as I have said, that this all created an unfair  
19 process that was a rubber stamp and that there was a conflict  
20 of interest, that may advance their claims in the lawsuit.  
21 And, again, I'm not expressing any views on that.

22 But if the defendants are proven incorrect in their  
23 position, the price of asserting the privilege, and someone  
24 then rules it doesn't apply, isn't that you waive all  
25 privilege. The price of asserting that there is not a conflict

1 of interest is not to waive the privilege in all documents that  
2 may pertain to that subject.

3 So I, with respect, will reject the assertion here of  
4 the crime fraud exception to the privilege.

5 I will give you my views about the particular  
6 documents that have been identified for review.

7 You know, my review 17352, 17411, 17409, 17415, 17417,  
8 those are all properly protected under the work product or  
9 attorney-client privilege as asserted.

10 19595 is an email chain between Ms. Massey and  
11 Ms. Roselli. The first few documents are. The last one of  
12 those chains -- in the chain is March 17, 2016.

13 But then there are in the chain that follow various  
14 emails between Dr. Jain and various school district or board  
15 members. Those have all been produced?

16 MS. BEDNAREK: Yeah.

17 THE COURT: Okay. And that's true if I ask for any of  
18 these?

19 MS. BEDNAREK: Yeah.

20 THE COURT: Well, those they have been produced. They  
21 would not be privileged. But then the communications between  
22 Ms. Massey and Mrs. Roselli (unintelligible) them is protected  
23 as work product.

24 The same is true for 19698, 19743, 19746, 19762,  
25 19777, 19920, 19929, 19937, 35364, 35607, 37236, 37341, and

1 37700. Some of these are duplicates of other documents that  
2 were in list one or so. Those are all properly protected as  
3 attorney-client or work product as asserted on the log, with  
4 the exception of various forwarded emails within them that are  
5 not privileged but it is represented have been produced  
6 independently.

7 Then turning to the FOIA documents, Group 4. Exhibit  
8 1 is properly whatever was redacted or is properly protected as  
9 attorney-client.

10 Exhibit 2, withheld information is properly attorney  
11 client.

12 Exhibit 4 there are four emails. The first one is --  
13 is it to -- from Ms. Trush (phonetic)?

14 MS. BEDNAREK: Trout?

15 THE COURT: Trout, yes.

16 MS. BEDNAREK: Trout, yes.

17 THE COURT: Trout. Which appears to predate the test.  
18 It is an email to students.

19 MS. SCHNAKE: And that's been produced regarding  
20 the --

21 THE COURT: And then an email after that from  
22 Ms. Wennstrom thanking Ms. Trout for providing it. And then  
23 two follow-on emails from Ms. Wennstrom to Ms. Roselli.

24 The latter two emails are privileged. The first two  
25 emails are not.

1           If they have not been produced, they are to be  
2 produced. Exhibit 8, 12, 14, 20, 22, 23, 24, and 25 are all  
3 properly privileged and may be protected to the extent that  
4 they have been redacted or withheld.

5           So that's my ruling on the samples. In those  
6 instances where I have said something needs to be produced if  
7 it has not already been produced, I will require the defense to  
8 do that promptly.

9           How long would it take?

10          MS. BEDNAREK: Probably by me doing it, I could do it  
11 by the end of the week.

12          THE COURT: Okay. So by this Friday?

13          Is that all right with you, Mr. Caro?

14          MR. CARO: Yes, your Honor.

15          THE COURT: So that would be August 25th. Now this  
16 was with a selected sample.

17          Mr. Caro, do what you want them to do any further  
18 review of the documents that were outside of the sample?

19          MR. CARO: No, your Honor.

20          THE COURT: Okay.

21          MR. CARO: No.

22          THE COURT: All right. So since we are all here  
23 together, you can fill me in on where you're at in discovery.  
24 I know that you had two depositions set last week. I know the  
25 deposition of Plaintiff A went forward.

1 Did Dr. Jain's go forward?

2 MS. BEDNAREK: Yes, it did, your Honor.

3 THE COURT: Okay. And both were completed?

4 MS. BEDNAREK: Yes.

5 THE COURT: And then that leaves Mr. Gale's (phonetic)  
6 deposition.

7 MS. BEDNAREK: Yes.

8 THE COURT: And that's set for next week. Is it the  
9 30th?

10 MS. BEDNAREK: The 30th, your Honor, yes.

11 THE COURT: All right. Is that the last deposition  
12 that's set?

13 MS. SCHNAKE: Yes.

14 MS. BEDNAREK: For defendants, yes.

15 THE COURT: All right. And the defense wasn't going  
16 to be taking any further depositions?

17 MS. BEDNAREK: No.

18 THE COURT: All right. And you're done with discovery  
19 August 31st.

20 All right. We have a status that's set August 31st at  
21 9:00 o'clock. Why don't we keep that day. Okay?

22 Is there anything that I should know about?

23 MS. BEDNAREK: No, your Honor.

24 MR. CARO: I don't think so, your Honor.

25 THE COURT: All right. And then as I said, the

1 interrogatory revisions they will be due a week from today,  
2 which will be the 29th. Okay?

3 Anything else?

4 MR. CARO: Thank you very much, your Honor.

5 THE COURT: All right. Thank you.

6 MS. BEDNAREK: Thank you, your Honor.

7 THE COURT: Mr. Caro, do you need to be by phone next?

8 If he needs to be by phone next time, that's fine.

9 MS. BEDNAREK: Okay.

10 MR. HARBECKE: Thank you, your Honor.

11 THE COURT: All right. Thank you.

12 (Which concluded the proceedings.)

13 CERTIFICATE

14 I certify that the foregoing is a correct transcript  
15 from the digital recording of proceedings in the above-entitled  
16 matter to the best of my ability, given the limitation of using  
17 a digital-recording system.

18

19

20 / **s/ Pamela S. Warren**  
21 Official Court Reporter  
United States District Court  
Northern District of Illinois  
22 Eastern Division

August 25, 2017  
Date

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